Supreme Court of the United States

OCTOBER TERM, 1956

No. 420

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Petitioner,*

v.

J. J. MICKELSON, Trustee in Bankruptcy of the Estate of WIRT COOK, an individual doing business as ST. PAUL SPORTING GOODS COMPANY, and UNITED STATES OF AMERICA, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT J. J. MICKELSON, TRUSTEE, IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 12) is reported at 132 F. Supp. 670. The opinion of the Court of Appeals for the Eighth Circuit (Petition, App. pp. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 10, 1956. A timely petition

for rehearing was denied on August 10, 1956. The jurisdiction of this Court is sought to be invoked under U.S.C., Title 28, Section 1254(1).

QUESTIONS PRESENTED

Petitioner's statement of the questions presented warrants a restatement. The only question presented here is whether the evidence is sufficient to support a finding that a fire which damaged merchandise insured by petitioner was not intentionally set by or on behalf of the insured, the District Court sitting without a jury having so found and the Court of Appeals for the Eighth Circuit having unanimously affirmed this finding.

STATEMENT

As petitioner properly asserts, this is an arson case—a civil action to recover on an insurance policy in which the defense of alleged arson was raised. The sole question of substance at the trial, on appeal, and here is one of fact—whether the fire in question was of an incendiary origin and was intentionally set by or for the insured.

The fire out of which this litigation arose occurred around midnight on Wednesday, October 8, 1952. After the fire, suit was brought by respondent, Trustee in Bankruptcy of the estate of one Wirt Cook, the insured, against petitioner to recover on a policy of fire insurance issued by petitioner. The United States intervened in the litigation to protect its liens for unpaid income taxes and penalties due from Wirt Cook. The case was tried without a jury and resulted in a judgment against the petitioner. The sole question was whether Wirt Cook started the fires which resulted in damage to the insured property so that petitioner is absolved of liability under the insurance policy. Although we are unable to accept *in toto* the petitioner's

statement of facts, it and the opinions below sufficiently point up the issue now presented to this Court.

On the basis of all the testimony and evidence the District Court concluded that the damage had been caused "by a fire which was of undetermined origin and not intentionally set by, for or on behalf of the insured named in said policy" (Finding III, R. 18). The District Court acknowledged that petitioner had made a strong showing "to the effect that the fire appeared to be incendiary in origin" (R. 16), but concluded that there was "no sufficient basis for a finding of fact to that effect" (R. 16). The most that could be said for petitioner's assertion of facts was, according to the District Court, that the circumstances were "such as to lead to suspicion of arson, but suspicion is most unsatisfactory as a basis of a finding of fact" (R. 16).

On appeal, petitioner continued to belabor that suspicion, but the Court of Appeals for the Eighth Circuit unanimously affirmed. As stated by the Court of Appeals (Petition, App. pp. 6a-9a):

> "There is little question in our minds but what from the evidence disclosed by the record the trial court could have found that this was an incendiary fire and that it was set by or on behalf of the insured, Wirt Cook. The point is, however, that the testimony was entirely circumstantial and the burden and responsibility of making the ultimate conclusion on conflicting testimony or testimony which is merely circumstantial rests with the jury or, where a jury has been waived, with the court itself.
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> "Here the trial judge saw and heard the witnesses and was in a far better position to determine close questions of fact than is an appellate court on

a cold record. It is argued by appellant that Wirt Cook had a motive in setting the fire, that is, financial profit, yet appellee points out that the amount of Wirt Cook's indebtedness eliminated any possibility of his recovering anything for himself. Appellee also points out that the record is devoid of any evidence directly connecting Wirt Cook with the setting of the fire. These things are matters which peculiarly present themselves for determination by the finder of the facts and, where the finder of such facts does not abuse the discretion which the law places on him, an appellate court has no right to substitute its judgment therefor."

REASONS FOR DENYING THE WRIT

THERE IS NO SHOWING OF ERROR IN THE FINDINGS OF THE COURTS BELOW WHICH WOULD WARRANT REVIEWING HERE THE AFFIRMANCE OF THE JUDGMENT.

Petitioner devotes a substantial portion of his petition to the contention that both the courts below made findings of fact which were so clearly erroneous as to require their being reviewed by this Court.

What petitioner has failed to point out is that where a petition turns entirely upon an appreciation of the particular facts involved, and where both of the courts below have agreed upon specific findings of these facts, the case is not an appropriate one for review by this Court. The concurrent findings or two-court rule, long announced by this Court, precludes a review of the issues of fact here.[1]

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[1] *Stuart* v. *Hayden*, 169 U.S. 1; *Brainard* v. *Buck*, 184 U.S. 99; *First Nat. Bank* v. *Littlefield*, 226 U.S. 110; *Baker* v. *Schofield*, 243 U.S. 114; *Second Russian Ins. Co.* v. *Miller*, 268 U.S. 552; *Texas &*

In those very rare cases where the particular fact determination is itself of nationwide importance or where there are conflicting rulings in the circuits on the same question of fact, this Court has on occasion reviewed the facts as found by two lower courts.[2] This routine action to recover on an insurance policy, however, does not even approach such situations. While, not unexpectedly, petitioner maintains that the case has some extrinsic importance, in truth it is a classic example of the type of litigation which gave rise to the enunciation of the concurrent finding rule.

Finally, petitioner asserts that the decisions below depart from principles of law established by the Minnesota courts. This is said to follow from the fact that in criminal cases in Minnesota circumstantial evidence, including evidence of motive and opportunity, which corresponds to the evidence offered in this case, is sufficient to justify sustaining, on appeal, the ultimate conclusion of the trial court. The three state authorities cited by petitioner merely hold that in a criminal case circumstantial evidence introduced by the state may be sufficient to justify a jury in finding that a fire which a defendant is accused of setting was incendiary in origin. This, of course, is not such a case; here the District Court, as the trier of fact sitting without a jury, concluded that in fact the evidence, circumstan-

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N. O. Ry. v. *Brotherhood of Railway Clerks*, 281 U.S. 548; *Page* v. *Arkansas Natural Gas Corp.*, 286 U.S. 269; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U.S. 3; *Virginian Ry.* v. *System Federation*, 300 U.S. 515; *United States* v. *O'Donnell*, 303 U.S. 501; *Anderson* v. *Abbott*, 321 U.S. 349; *Allen* v. *Trust Co.*, 326 U.S. 630; *United States* v. *Dickinson*, 331 U.S. 745.

[2] See, *e.g.*, *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30; *Concrete Appliances Co.* v. *Gomery*, 269 U.S. 177; *Schneidermann* v. *United States*, 320 U.S. 118.

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CITATIONS

Cases:

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United States v. *Dickinson*, 331 U.S. 745	5
United States v. *O'Donnell*, 303 U.S. 501	5
Virginian Ry. v. *System Federation*, 300 U.S. 515	5

tial and otherwise, was such that he found the fire to be of undetermined origin. The three cases cited by petitioner are not authority, as the Court of Appeals pointed out, for the proposition that this evidence requires or even justifies an appellate court in reversing the conclusions of the trier of fact that no arson took place.

CONCLUSION

This action on an insurance policy is overwhelmingly and peculiarly a fact case. The facts have been industriously and extensively examined by the two lower courts. The conclusion of the trial court after a full hearing and lengthy testimony was that no arson was involved. After full consideration by the Court of Appeals, the opinions, findings and judgment of the District Court were unanimously affirmed. There is no conflict among the circuits. No federal question is presented. There are patently no "special and important reasons" for review by this Court (Rule 19(1). The petition should be denied.

Respectfully submitted,

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